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No. 94-959

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PUERTO RICO AQUEDUCT AND
SEWER AUTHORITY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY OF PETITIONER

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TABLE OF AUTHORITIES

CASES

I.N.S. v. Cardoza Fonseca,
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REPLY OF PETITIONER

1. The Respondent Environmental Protection Agency (EPA) does little more than reiterate the Court of Appeals' argument. It does not explain how and why EPA used a summary judgment procedure where none was warranted or invoked, where none had been used before, and where EPA's own regulations explicitly provided, in the plainest possible language, for a less stringent threshold burden on a party seeking merely an evidentiary hearing. Predictability, that is, the ability of a party "to attach talismanic significance", Pet. App. A10-A11, to the precise words in a regulation and to the actual historical conduct of an agency of government is the essence of reasoned and reasonable decision-making. I.N.S. v. Cardoza Fonseca, 480 U.S. 421, 446 (1987) (Stevens, J.). Its complete absence here, and the different manner in which other Courts of Appeals have

scrutinized comparable agency decision-making, warrants review by this Court.

2. The USGS Report (Pet. App. A62) represents an empirical study; actually, the only empirical study of the Mayaguez outfall's real effects, undertaken over a four year period, from 1987 to 1991. Pet. at 26. This Report not only demonstrated the benign effects of the effluent discharge as it occurs presently, but also established that the outfall has not adversely affected the biota since it began discharging in 1987. The USGS Report therefore provides a future impacts analysis by demonstrating how the outfall's discharges, beginning in 1987, affected the biota through 1991 -- a future analysis based on actual observation. This empirical analysis by USGS gives both a methodology and a substantive result that meets the "future impact" requirement that EPA has imposed in 40 C.F.R. § 125.61(f)(3), and was more than sufficient to meet the threshold burden for an evidentiary hearing. As such, PRASA deserved "the benefit of the doubt", Pet. App. A22-A23. EPA's refusal to accord that benefit represents a fundamental departure from, and an enduring legal uncertainty about, the meaning of the admonition in Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609 n.17 (1973), that warrants review by this Court.

3. It also should be obvious PRASA has not "conceded that the USGS study did not address future impacts", nor are PRASA's statements that the USGS Report provides positive evidence regarding the future impacts showing, "simply speculations of counsel". Brief in Opposition at 10. Moreover, EPA attempts to avoid the application of *Weinberger*'s warning because, as EPA alleges, the USGS Report "failed to address a fundamental issue . . ." on future impacts. Brief in Opposition at 9 (quoting the First Circuit, at Pet. App. A22-A23). Respondent does not even mention the final conclusion in the body of the USGS Report (Pet. App. A62), that finds that the effluent has not affected adversely the biota surrounding the outfall over a four year

period of operation. Instead, EPA continues to seek comfort, as did the First Circuit and the EPA Appeals Board before it, on a selective quote from a subordinate study in the Appendix of the USGS Report (Pet. App. A62) by a scientist who later signed and agreed with the final conclusion of the entire USGS Report. Brief in Opposition at 8-9. Such an argument by EPA hardly reflects reasoned or reasonable decision-making, or a fair representation to this Court of what, in fact, the USGS concluded. It does demonstrate the basis for a pervasive concern by this Court about the means for evaluating scientific findings in government regulatory settings, especially in a setting where, as here, the decision-making agency undertook no empirical study of its own and provided no guidance on how such a study should be undertaken.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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